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Division I
State of Washington
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NO. 76627-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALMSEGGETT HABTAI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Lori K. Smith

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT</u>	1
THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT IMPOSED A KIDNAPPING OFFENDER REGISTRATION REQUIREMENT.	1
1. <u>State v. Enquist</u> does not require the result advocated by the <u>State</u>	2
2. <u>Despite the more limited holding of State v. Boyd, the combined impact of homeless registration requirements, online posting, and international travel restrictions renders the modern statute punitive.</u>	4
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Boyd</u> 1 Wn. App. 2d 501, 408 P.3d 362 (2017).....	4-6
<u>State v. Enquist</u> 163 Wn. App. 41, 256 P.3d 1277 (Div. II 2011)	2-5
<u>State v. Ward</u> 123 Wn.2d 488, 869 P.2d 1062 (1994).....	1-6
<u>FEDERAL CASES</u>	
<u>Kennedy v. Mendoza-Martinez</u> 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).....	5, 6

A. ARGUMENT

THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT IMPOSED A KIDNAPPING OFFENDER REGISTRATION REQUIREMENT.

As discussed in the opening brief, the sentencing court exceeded its authority by imposing registration requirements on Habtai, because the modern sex offender statute is punitive and the sentencing court is not empowered to find additional facts (i.e. whether Habtai is related to G.S.) that were necessary to impose this additional punishment. Br. App. at 7-8. More specifically, the combined effect of several post-Ward amendments to the sex offender registration statute render it punitive, including the weekly, in-person, registration requirement for homeless persons, mandatory internet posting of sex offender registration information, and international travel restrictions.

In response, the State argues recent Court of Appeals jurisprudence supports the conclusion that these amendments do not render the statute punitive. E.g. Br. Resp. 9-11.

For the reasons discussed below, the reasoning of the cases cited by the State is not binding, unpersuasive, inapplicable, incomplete, or a combination thereof, and this Court should still conclude the combined effect of the modern amendments is to render the statute punitive.

1. State v. Enquist does not require the result advocated by the State.

The State argues that in the case of State v. Enquist, the Court of Appeals considered recent statutory changes to the sex offender statute and upheld the Washington State Supreme Court's conclusion in State v. Ward that the changes did not render the statute punitive. Br. Resp. at 9-11 (citing State v. Enquist, 163 Wn. App. 41, 256 P.3d 1277 (Div. II 2011); State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994)). For the reasons discussed below, Division II's reasoning in Enquist is not binding, not persuasive, and not dispositive of the case at bar.

The Washington State Supreme Court recently rejected the rule of "horizontal stare decisis" and held that divisions of the Court of Appeals are not bound by the holdings of their sister divisions. In re Personal Restraint of Arnold, --- Wn.2d ---, 410 P.3d 1133, 1134 (2018). Thus, Enquist, a Division II case, is not binding on this Court.

In addition, the reasoning of the Enquist Court is not persuasive. In Enquist, the defendant argued the statute's new requirement for transient sex offenders to register weekly, in-person, at the sheriff's office, violated *ex post facto* principles because this requirement was a retroactive punishment. Id. at 44-45.

First, the Enquist Court failed to meaningfully address the new homeless registration requirements. Division II merely recited the Ward Court’s analysis and factors, and summarily concluded “for the reasons articulated in Ward, the transient registrant requirements are not punitive.” Id. at 48-49. The Enquist Court went on to reason that where the requirements were not punishment, there was no *ex post facto* violation despite the increased “inconvenience” of the requirements. Id. at 49.

It was undisputed that the new statute imposed additional requirements on homeless sex offenders; the Enquist Court openly acknowledged the increased burden, calling it an “inconvenience.” Id. at 49. However, the Enquist Court failed to acknowledge that the Ward Court had engaged in a balancing test and that this additional burden required a re-balancing. The Enquist Court did not consider the additional burdens, re-balance according to the Ward Court factors, and then conclude the statute was not punitive. Instead, because the Enquist Court made no meaningful attempt to consider the weight of the additional transient registration requirements, its reasoning is unpersuasive.

Second, as conceded by the State, the Enquist Court failed to address the new travel requirements at all. Br. Resp. at 11. Division II addressed only Enquist’s challenge to the in-person homeless registration requirements as a potential infringement on his right to travel. Id. at 49-51.

Division II concluded that the registration requirements were not unconstitutional as applied to Enquist because, per the holding of Ward, these requirements were not punitive and were not intended to be punitive, and also because they were not an outright ban on intra-state travel where procedures allowed for county to county moves. Id. at 50-51. Division II never considered the inter-state or international travel burdens of the new statutory requirements at issue in Habbitai's case. For this reason as well, the Enquist Court's holding is unpersuasive in resolving the case at bar.

2. Despite the more limited holding of State v. Boyd, the combined impact of homeless registration requirements, online posting, and international travel restrictions renders the modern statute punitive.

The State argues the recent Division I case of State v. Boyd also considers recent amendments to the sex offender registration statute and supports the State's argument that the statute remains regulatory, not punitive. Br. Resp. at 11 (citing State v. Boyd, 1 Wn. App. 2d 501, 408 P.3d 362 (2017)).

In Boyd, the defendant had been convicted of child rape prior to statutory amendments requiring homeless persons to register weekly in-person at the sheriff's office. Id. at 505-06. The defendant in Boyd, like the defendant in Enquist, challenged the imposition of homeless registration requirements as a violation of the *ex post facto* clauses. Id. at 507. The

Boyd Court agreed that the homeless registration requirements were more burdensome than the statute considered by Ward. Id. at 510. In contrast to Enquist, the Boyd Court did not rely solely on the holding of Ward, and instead engaged in a detailed analysis of the Mendoza-Martinez factors to consider the impact of the homeless registration requirements. Id. at 511-13; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

First, the court considered how the new requirements impacted the defendant, and concluded “there is no evidence in the record that reporting in person weekly interfered with his ability to get a job, find housing, or travel.” Id. at 511. Second, the court rejected arguments that the homeless registration requirements resembled traditional probation, parole, or public shaming, or that they encouraged vigilante justice, reasoning that “Boyd remains free to move as he wishes and to live and work without supervision.” Id. at 511-12. Third, the court rejected arguments that online posting of the information was akin to public shaming or increased the punitive effect of the statute. Id. at 512. Finally, the court rejected arguments that the registration requirements were excessive, reasoning that the Legislature had wide discretion to act in the public interest. Id. at 512-13. As a result, the court concluded the “weekly, in person check-in

requirement” imposed on homeless persons was not unconstitutional. Id. at 513.

Although the Boyd Court admittedly considered some of the arguments raised by Hantai in his opening brief, for the reasons discussed in the opening brief, Hantai respectfully requests that this Court reconsider the conclusion reached by Boyd, and instead conclude that the homeless registration and online posting requirements render the modern statute punitive. In addition, the Boyd Court did not consider the punitive impact of the international travel restrictions, or the combined impact of these restrictions with the new online posting and homeless registration requirements. Hantai asks this Court to consider the impact of these requirements as a whole, balance them with the Mendoza-Martinez factors and conclude that their combined impact renders the statute punitive.

B. CONCLUSION

For the reasons discussed above, and in the opening brief, the combined effect of the post-Ward sex offender registration amendments is to render the statute punitive.

Hantai respectfully requests that this Court strike the kidnapping offender registration requirement from his sentence and remand for resentencing.

DATED this 21st day of March, 2018.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "E. Rania Rampersad".

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